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No. 577

In the Supreme Court of the United States

OCTOBER TERM, 1940

ARTHUR W. MITCHELL, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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OPINIONS

The court below rendered no opinion. The Commission's report, *Mitchell* v. *Chicago, R. I. & P. Ry. Co.* (R. 18–33), appears in 229 I. C. C. 703.

QUESTION PRESENTED

The question presented is whether the Commission committed error of law in dismissing appellant's complaint respecting accommodations for colored passengers traveling in Arkansas on train No. 45 of the Chicago, Rock Island & Pacific Rail-

way Company on through journeys from Chicago, Ill., to Hot Springs, Ark., and refusing, under the facts and circumstances shown, and upon a finding that the present accommodations are not unjustly discriminatory or otherwise violative of the Interstate Commerce Act, to enter an affirmative order for the future, as sought in the complaint.

STATEMENT

This is a direct appeal from a final decree (R. 53) of the court below dismissing appellant's petition (R. 1-40), seeking *inter alia* to set aside the Commission's order of dismissal (R. 34).

On September 2, 1937, appellant filed complaint with the Commission (R. 2–7), naming as defendants the Illinois Central Railway Company, the trustees of the Rock Island, and the Pullman Company, alleging, in effect, that defendants, in complying with an Arkansas statute requiring segregation of the races during transportation, do not provide as desirable accommodations for colored as for white passengers traveling in Arkansas over the line of the Rock Island at first-class fares from Chicago, Ill., to Hot Springs, Ark., and that this results in unreasonable charges and unjust discrimination against, and undue prejudice to, colored passengers, in violation of sections 1 (5), 2, 3 (1), and 13 (4) of the Interstate Commerce Act.

It was further alleged that by reason of the facts stated defendants had violated the Fourteenth

Amendment, in that they denied complainant the equal protection of the laws.

The relief requested by the complaint was that the Commission, after due hearing and investigation, enter an order commanding defendants to cease and desist from the violations of the Act alleged and to establish and apply in the future to the transportation of persons between the origin and destination named, in lieu of the services and facilities then being furnished, such other services and facilities as the Commission should deem reasonable and just (R. 7). The complaint did not ask for an award of damages (R. 28).

There was a hearing (R. 66–213); briefs were filed; an examiner's proposed report was issued (R. 10–17), to which complainant filed exceptions (R. 260–279), and defendants filed reply (R. 214–219); the proceeding was orally argued before the Commission; and, on November 7, 1938, the Commission issued its report (R. 18–30), containing findings of fact and conclusions thereon. Its ultimate conclusion and finding was that the alleged violations of the Act had not been substantiated and that the complaint should, therefore, be dismissed. With the report an order was issued dismissing the complaint.

The Commission found that the case was built mainly on an unpleasant experience complainant had on his above-mentioned trip from Chicago to Hot Springs. "On the evening of April 20, 1937, he left Chicago for Hot Springs over the lines of

the Illinois Central Railroad Company to Memphis, Tenn., and the Rock Island beyond, traveling on a round-trip ticket he had purchased at 3 cents per mile from the initial carrier's ticket agent in Chicago. He had requested a bedroom on defendants' through Chicago-Hot Springs Pullman sleeping car, but, none being available, the ticket agent provided him with a compartment as far as Memphis in the sleeper destined to New Orleans, La. Just before the train reached Memphis, on the morning after leaving Chicago, he had a Pullman porter transfer him, together with his hand baggage and other personal effects, to the Chicago-Hot Springs sleeper then on the same train, but which was to leave Memphis at 8:30 a. m., on Rock Island train 45, and reach Hot Springs, 193 miles west, at 1:05 p. m., the same day. Space was available and the porter assigned him a particular seat in that car, for which he was to pay the established fare, 90 cents." (R. 21.)

"Shortly after leaving Memphis and crossing the Mississippi River into Arkansas the train conductor took up the Memphis-Hot Springs portion of his ticket, but refused to accept payment for the Pullman seat from Memphis and, in accordance with custom, compelled him, over his protest and finally under threat of arrest, to move into the car provided for colored passengers, in purported compliance with an Arkansas statute requiring segregation of colored from white persons by the use of

cars or partitioned sections thereof providing 'equal, but separate and sufficient accommodations', for both races." (R. 21.)

"Later the conductor returned the portion of the ticket he had taken up and correctly advised complainant that he could get a refund on the basis of the coach fare of 2 cents per mile from Memphis. The refund was never claimed from defendants and is not here sought, but defendants stand ready to make it upon application." (R. 21.)

"Complainant has an action at law pending against defendants in the circuit court of Cook County, Ill., for damages incident to his transfer."[1] (R. 21–22.)

The pullman car contained 10 sections of berths and 2 drawing rooms.[2] "The use of one of the drawing rooms," the Commission found, "would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable. Occasionally they are used by colored passengers, but in this instance both drawing rooms were already occupied by white passengers." (R. 22.)

[1] Although there is no official information, it is our understanding that the case has not yet been tried.

[2] It appears from the evidence that ordinarily the Hot Springs sleeping car used in this train has a compartment in addition to two drawing rooms. Appellant so testified (R. 85). The Rock Island timetable, Ex. 4, p. 6, R. 207, so shows.

The colored passengers' coach was an old combination affair, divided by partitions into three main parts, one for colored smokers, one for white smokers, and one in the center for colored men and women. Complainant sat in the women's section. There was a toilet in each section, but only the one in the women's section was equipped for flushing and it was for the exclusive use of the colored women. The car was without washbasins, soap, towels, or running water, except in the women's section. Complainant testified that the car was filthy and foul smelling, but the testimony of defendants was to the contrary (R. 22–23).

In July 1937—about 3 months after complainant made his trip—the old combination coach was replaced by a new, all-steel, modern, air-conditioned coach. This coach is divided by a partition into two sections, one for colored and the other for white passengers; and it has comfortable seats. In each section there are washbasins, running hot and cold water, paper towels and drinking cups, and separate flush toilets for men and women (R. 23).

This coach, the Commission found, "is as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fares." (R. 23.)

The Commission found that the demand of colored passengers for Pullman accommodations over the route in question is shown by the evidence to have been negligible over a period of many years.

"Only about 1 negro to 20 white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations. The conductor recalled about 10 or 12 instances in the past 32 years of his service on the train, wherein colored passengers who had entered Pullman cars were required by him to move into the colored passengers' coach. He estimated that the demand for Pullman accommodations did not amount to one per year. What demand there may have been at ticket offices does not appear." (R. 24.)

Upon the evidence the Commission concluded that "The present coach properly takes care of colored second-class passengers, and the drawing rooms and compartments in the sleeper provide proper Pullman accommodations for colored first-class passengers, but there are no dining-car nor observation-parlor car accommodations for the latter, and they cannot lawfully range through the train." (R. 24.)

Section 1 (5) of the Interstate Commerce Act (49 U. S. C., secs. 1–27) provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, . . ."

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The Commission found that there was no violation of this provision. There was no evidence bearing upon the subject of the reasonableness of the fares themselves. If a carrier collects a 3-cent fare and furnishes only 2-cent accommodations, he has violated section 6 (7) of the Act, which requires strict adherence to the published rates. The Commission is authorized by section 16 (1) to enter an order awarding reparation for any overcharge, but complainant did not request such an order, no doubt for the reason that none is necessary, since the carrier is willing to make refund of the overcharge of 1 cent a mile upon application and upon surrender of the portion of the ticket covering the transportation from Memphis to Hot Springs.[8]

Section 13 (4) inhibits unjust discrimination against interstate commerce growing out of the relation of intrastate rates to interstate rates. Cf. *U. S.* v. *Louisiana,* 290 U. S. 70; *Florida* v. *U. S.,* 292 U. S. 1. The Commission found that there was no violation of this section because no intrastate fares were involved.

Sections 2 and 3 (1) of the Act provide:

> "SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge,

[8] The trustees of the Rock Island, in their answer to appellant's petition filed in the Circuit Court of Cook County, Ill., made tender of the amount of the overcharge (R. 93).

demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3 (1). That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever, or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Under section 15 (1) the Commission is authorized to enter an order for the future requiring the carrier to cease and desist from any violation of these sections whenever, after full hearing, it is of the opinion that they are violated. Respecting the allegations of violations of sections 2 and 3, the Commission found that there is no showing that colored passengers are treated differently from white passengers on their journeys from Chicago

to Memphis over the Illinois Central, and that apparently that road is in no way chargeable with discrimination; that there is no discrimination on the part of the Pullman Company, because it provides accomodations in the form of drawing rooms, which if not already occupied or reserved for someone else, are available for colored passengers west of Memphis at the seat fare of 90 cents; that it is not its duty to enforce the State law, but that in deciding the case on the facts presented it must recognize that under the State law defendants must segregate colored passengers; that in these circumstances the present colored passenger coach and the Pullman drawing rooms meet the requirements of the Act; and that, as there is comparatively little colored traffic, and no indication that there is likely to be such demand for dining-car and observation-parlor car accomodations by colored passengers as to warrant the running of any extra cars or the construction of partitions, the discrimination and prejudice are plainly not unjust or undue; that only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove and prevent; that therefore the complaint should be dismissed (R. 29–30).

It is plain from the report that the Commission, in reaching this conclusion, took into consideration that appellant was the sole complainant, without authorization to speak for anyone else; that his

complaint "mentions but a single incident of alleged discrimination and prejudice," i. e., the one described in the report "in which complainant was involved"; that the case was "built mainly on an unpleasant experience complainant had about 18 months ago"; that the Pullman car on Rock Island train No. 45 "contained 10 sections of berths and 2 compartment drawing rooms"; that the "use of one of the drawing rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent seat fare being applicable"; that "there is hardly ever a demand from a colored passenger for Pullman accommodations"; that there is no discrimination against colored passengers by the Illinois Central or the Pullman Company; that the remaining defendant, the Rock Island, is in the hands of trustees in bankruptcy; that the journey over its road from Memphis to Hot Springs on its train No. 45 is a day-time run of only 4 hours, 35 minutes; that the running of two dining cars and separate parlor cars, or the construction of partitions in the present cars, would put this carrier to great expense and would also cause it loss of needed revenues, because of the extremely slight, almost nonexistent demand for such accommodations by colored passengers, and that there was no evidence whatsoever of any demand either by appellant or any other negro passengers for dining-car accomodations on this short

run, on which the train leaves at 8:30 a. m. and arrives at destination at 1:05 p. m. the same day.

There was no evidence before the Commission that complainant ever made a similar journey over the Rock Island, or that he was ever before a passenger on the Rock Island. Nor was there any evidence that complainant intends in the future to make a similar trip over the Rock Island.

There was no evidence before the Commission to support a finding of unjust discrimination against complainant respecting dining-car service. The evidence indicates that in Arkansas the Rock Island, in view of the segregation statute, excludes colored passengers from the dining car while white passengers are being served, but there was no evidence before the Commission that complainant desired dining-car service or any eating accommodations while the train was in Arkansas, or that he was denied separate eating accommodations substantially similar to those afforded white passengers.

There was no showing before the Commission and there is none here that complainant has been authorized by any other colored persons to complain on their behalf because of alleged discrimination against them.

PROCEEDINGS IN COURT BELOW

April 20, 1939, appellant filed petition in the court below (R. 1-40) praying that the Commission's order be set aside, annulled, and vacated, and

that a decree be entered granting to him the relief prayed for in his complaint to the Commission. Answers were filed (R. 41–52). May 27, 1940—more than a year after the filing of the petition—the case was brought up for hearing before a three-judge court (R. 220–258).

June 27, 1940, the court filed findings of fact and conclusions of law (R. 52–53). It found that the Commission's order was made after a full hearing; that the Commission's findings were all supported by substantial evidence, and are not erroneous; that the Commission's order is supported by the findings, is not contrary to law, and contravenes no provision of the Constitution; that the court is without jurisdiction to grant the relief sought, or any part thereof; and that the petition should be dismissed.

On the same day, the court issued its decree, dismissing the petition for lack of jurisdiction (R. 53). While there was no opinion by the court explaining its reasons for holding that it lacked jurisdiction to grant the relief sought, it would seem that the holding is based on two grounds: (1) The court was clearly without jurisdiction to grant the prayer of the petition that "a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the said Commission" (R. 40), inasmuch as the grant of such a prayer would require exercise by the court of administrative functions; (2) there was no showing by plaintiff of his need for the extraordinary remedies of equity.

THE EVIDENCE

At the hearing before the court there was introduced *inter alia* a certified copy of the evidence before the Commiss[redacted]221). This evidence, transmitted to this Court as an original exhibit (R. 63), has been printed in full (R. 66–213). Appellant, in his brief before this Court, at page 13 and elsewhere, refers to his own abstract of the evidence, which he has reproduced in the appendices to his brief here, pp. 19–50. His brief makes frequent reference to this abstract. To avoid misunderstanding, attention should be called to the fact that appellees have not agreed that such abstract is a full, true, and accurate abstract of the evidence.

ARGUMENT

I

Appellant has failed to show that he has legal interest in the accommodations to be furnished in the future by the Rock Island on its train No. 45

In *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, the Court, reexamining the "negative order" doctrine, noted that the prior decisions involving the doctrine fall into three categories, the third of which is: "Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person." (P. 130.) The order in question, neither compelling nor forbidding conduct on appel-

lant's part, or on the part of a third person, seems clearly to fall within the third category, in reference to which the Court said, p. 136: "The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the *Procter & Gamble* case, since the bill sought to avoid a multiplicity of suits." They are not satisfied in this case. For, although appellant complained of a practice alleged to be discriminatory, and prayed for an order for the future correcting the practice, he did not show that the practice would affect him in the future.

Appellant's case before the Commission related solely to the accommodations furnished to him on a single trip from Chicago to Hot Springs. He neither alleged nor submitted evidence to show that he will have occasion or intends to make a similar trip in the future. In these circumstances it would seem that recovery of damages, if any, sustained on his one trip would constitute complete relief. He has an action at law pending in the Circuit Court of Cook County, Ill., for such damages (R. 21–22).

The relief he sought before the Commission was a legislative order for the future commanding the carriers to cease discriminating against him and other colored passengers in respect of accommodations on Rock Island train No. 45. But he was not authorized to seek avoidance of discrimination against other colored passengers.

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As a litigant in judicial proceedings, appellant may urge only his own grievances. This Court has said several times that it "will not listen to a party who complains of a grievance which is not his." *I. C. C.* v. *Chicago, R. I. & P. Ry.*, 218 U. S. 88, 109 and cases cited; *Arkadelphia Co.* v. *St. L. S. W. Ry. Co.*, 249 U. S. 134, 149; *Avent* v. *U. S.*, 266 U. S. 127; *McCabe* v. *A., T. & S. F. Ry. Co.*, 235 U. S. 151.

The *McCabe* case was a suit by five negro citizens of the State of Oklahoma against certain railway companies to restrain them from obeying the Oklahoma separate coach law. This Court held that none of the complainants had personally been refused accommodations equal to those afforded to others and that they did not have sufficient interest in the subject matter to enable them to maintain the suit. It said:

"The desire to obtain a sweeping injunction can not be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks. The bill is wholly destitute of any sufficient ground for injunction and unless we are to ignore settled principles governing equitable relief, the decree must be affirmed." (P. 164.)

The bill contained "some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be a 'multiplicity of suits,' there being at

least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights." "But," the Court held, "we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. There is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. [Citing cases.]"

Although appellant submitted no evidence of an intention to travel again to Hot Springs over the Rock Island, he did find occasion to make the following significant statement (R. 157):

> "EXAMINER DISQUE. You not only want a Pullman car, but you want another car, an observation car, put on there?
>
> MR. MITCHELL. I want dining car accommodations also.
>
> EXAMINER DISQUE. You want another observation car put on, and you cannot mix them in the same dining car, so you want another dining car put on there?
>
> MR. MITCHELL. Yes. If that is what they should do, under the law, let them pay the

> price, and give it to me. * * * If they have passed a law that works that hardship on them, we want to take advantage of it."

In *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, the Court held that in a suit to set aside a Commission order plaintiff must show that he has, or represents others having, a legal right or interest that will be injuriously affected by the order; that appellant could not maintain the action because its interest was not a legal one. The Court observed that the Urgent Deficiencies Act "does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for the setting aside of an order. But it does require that the petition shall set forth 'the facts constituting petitioner's cause of action,' and by other provisions show that for failure so to do the suit shall be dismissed. *Id.*, section 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be unjustly affected by the order. *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148. *Sprunt* v. *U. S.*, 281 U. S. 249, 254. *Pitts. & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 486."

The Court further held: "Plaintiffs have failed to show that they are so qualified. Their interest . . . is no more than a sentiment, . . ." The interest of appellant here seems to be no more than a sentiment, since he has not shown he will have occasion to use the facilities of the Rock Island in the

future. He apparently seeks to champion the rights of negroes generally who may in the future use those facilities.

Appellant in argument before the court below stated:

> "As a matter of fact, I have been down to Hot Springs several times since this thing happened. Of course, I have not gone down there on the Rock Island Railroad. I have gone down on the Missouri Pacific, which is a little more liberal and where you can get accommodations and something to eat." (R. 255.)

This statement indicates an affirmative intention not to patronize the Rock Island again. It admits appellant's lack of interest in the alleged discriminatory practice of the Rock Island. It establishes that the future practice, whatever it is, will not affect him. It shows that he has no standing to invoke the extraordinary remedy of equity; that he needs no decree for the future to compel the Rock Island to cease discriminating against him. He is not authorized and has no standing to complain in behalf of others. He has a complete remedy at law for any damages sustained on the one trip he made over the Rock Island. That remedy he has invoked.

The evidence before the Commission related only to the practice of the three named defendants in respect to accommodations furnished on one train, particularly Rock Island train No. 45 from Memphis to Hot Springs, on which, in deference to the

Arkansas statute, the practice of segregating in Arkansas is followed. There was no evidence disclosing the practice of the Missouri Pacific or any other railroad, either in Arkansas or elsewhere.

There is nothing of record to show that appellant's pending court suit for damages is predicated upon an alleged violation of the Interstate Commerce Act which requires a preliminary administrative finding by the Commission. Appellant has not so alleged; he has made no suggestion to that effect to the Commission. The fact that such a suit is pending was divulged only because appellant desired to prove certain things by introducing copies of the defendant's answers in that suit. The answers themselves were not put in; by stipulation of counsel certain paragraphs were read into the record (R. 90–96). No copy of the declaration showing the basis of appellant's suit was introduced before the Commission. There is no showing that the suit involves an administrative question. The inferences are that it does not; for, if appellant sought damages for violation of any provision of the Interstate Commerce Act, it is reasonable to suppose he would have claimed them in his case before the Commission. The Commission is authorized to award full damages for any violation of the Act. Section 16 (1); *L. & N. R. Co.* v. *Ohio Valley Tie Co.*, 242 U. S. 288.

The circumstances seem to indicate that appellant's action at law is based on alleged violation of

common law rights. Such suits have been maintained in several instances; in none was it held that an administrative determination by the Commission was necessary. *Chiles* v. *C. & O. R. Co.*, 218 U. S. 71; *W., B. & A. El. R. Co.* v. *Waller*, 289 F. 589; *Huff* v. *Norfolk-S. R. Co.*, 88 S. E. 344.

The defendants urged that the complaint was insufficient to raise any issue as to practice, since the complaint mentions but a single incident of alleged discrimination and prejudice, and that one incident does not amount to a practice. The Commission overruled this contention on the ground that the one incident was mentioned as representative of an alleged practice that was expected to continue (R. 20).

Section 13 (2), Interstate Commerce Act, provides that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Cf. *I. C. C.* v. *Baird*, 194 U. S. 25, 39.*

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* In that case the complaint to the Commission was filed by William Randolph Hearst alleging that certain interstate freight rates on anthracite coal were unreasonable and otherwise violative of the Interstate Commerce Act. It appears from the opinion of the Circuit Court, 123 Fed. 969, that Hearst was not a shipper of anthracite coal and that his only interest in the rates attacked was that of "an individual who merely purchases merchandise, the price of which is advanced by reason of its including the cost of transportation from the place of production to the place of sale." Under the decision in that case, almost any member of the public would have the right to maintain proceedings before the Commission.

But the right of an individual or of an association or league to prosecute proceedings before the Commission does not in itself confer the right to maintain judicial proceedings to set aside the Commission's order and the corollary right to take a direct appeal to this Court. As stated in *Edward Hines Trustees* v. *U. S.*, 263 U. S. 143, 148, ". . . plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury actual or threatened." In *Pitts. & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, it was held that the "appellant had no standing to bring this suit . . . in the absence of resulting actual or threatened legal injury to it . . ."; that certain "vague speculative interests" were "clearly insufficient to give the Pittsburgh an independent standing in this suit." See also *Sprunt* v. *U. S.*, 281 U. S. 249, 256–257; *Algoma Coal Co.* v. *U. S.*, 11 F. Supp. 487, 495–496; *U. S.* v. *Merchants etc. Assn.*, 242 U. S. 178, 188.

Although appellant has affirmatively indicated an intention not to patronize the Rock Island again (R. 255), the speculation that he might nevertheless do so is clearly insufficient to give him standing to seek an order for the future respecting the Rock Island's practice. It is now approximately 4 years since appellant made his one trip. It seems clear

that the practice of the Rock Island has not affected appellant during that 4-year period, and evidently will not affect him in the future.

The following argument is submitted for consideration in the event the Court should find that appellant has standing to maintain the suit.

II

The Commission's findings are fully supported by the evidence

Appellant's brief (pp. 17, 37, 78) alleges in general terms that the Commission's findings are not supported by the evidence. But in the absence of specification it is unnecessary to review the evidence to show support for each of the findings. Reference to some of the evidence, however, seems desirable.

The evidence shows that drawing rooms and compartments in Pullman cars are available to colored passengers.—Appellant desired to travel in Pullman cars and to that end purchased a first-class railroad ticket, at 3 cents a mile (R. 70, 158). He endeavored to purchase a drawing room or bedroom in the through Hot Springs sleeper. But none was then available in that car, all having been previously taken by other passengers. Similar space was available in a New Orleans sleeper and appellant purchased a compartment in that car as far as Memphis (R. 70, 73).

As the train approached Memphis the next morning, appellant had the porter move him into a seat in the body of the Hot Springs sleeper (R. 71). This Pullman car is carried from Memphis to Hot Springs on Rock Island train No. 45.

Shortly after leaving Memphis the train crossed the Mississippi River into the State of Arkansas, en route to Hot Springs. When the Rock Island train conductor came in due course to collect appellant's ticket, appellant offered to purchase a seat in the Pullman (R. 81), for which the Pullman charge was 90 cents (R. 162). The conductor informed appellant he could not ride in the Pullman car, because of the Arkansas segregation law, unless there was a vacant compartment or drawing room (R. 85–86, 94, 130–131, 139, 147–148, 160). There was none (R. 131, 138), and appellant was compelled to move into the combination coach (R. 131–133).

The coach fare was 2 cents a mile. The conductor informed appellant that he was entitled to a refund of 1 cent a mile for the distance from Memphis to Hot Springs (R. 71, 81, 93, 131). Appellant has not surrendered the ticket for a refund, because he "thought it was worth more in a hearing like this than it would be to turn it in." (R. 71.) But he sought no order from the Commission directing payment of the overcharge.

Appellant was sold a 3-cent per mile ticket at Chicago through to Hot Springs because he re-

quested it, even though he had no parlor-car reservation beyond Memphis. His inability to secure a reservation in the Hot Springs sleeper was not because he is a colored man, but because of the lateness of his application. He testified: "During the day of the 20th I believe—or the 19th, I called the . . . ticket office and made a reservation for the trip." (R. 70.) He left on the 20th. Had he applied for reservations earlier he could no doubt have obtained the space he desired—a drawing room or compartment through to Hot Springs—and then, no doubt, the trouble he experienced would have been avoided.

The conductor in charge of Rock Island train No. 45 testified that colored passengers may not use the sleeping car (R. 160), that is, they are not permitted to ride in the body of a Pullman sleeping car in the State of Arkansas, because of the State segregation statute (R. 131, 138), but that they are permitted to ride in Pullman drawing-rooms and compartments, at the regular *seat* fare, if such accommodations are available (R. 138, 148–149). By "if available," he meant that if a colored person applies for a through Pullman ticket "he can get it, if it is not sold. They do not hold it, to wait and see if some white man is going to buy it. They will sell it to him." (R. 160.)

Although appellant testified that he was told by the conductor he could not ride in the Pullman

sleeping car in Arkansas because he was colored (R. 85), he later qualified his statement as follows:

> "Well, he said this; he said 'The law of Arkansas has made it a crime for a negro to ride in a car of that type, in the presence of white people'; and that they would have to ride in compartments, or in drawing rooms; that they couldn't ride in the car." (R. 85–86.)

The conductor further testified that if at the time of this transaction there had been a vacant compartment, or a vacant drawing room in that Pullman car, he would have put appellant in it (R. 138–140); that when he has a drawing room or a compartment available, he puts the colored passenger in it, leaving the door open fronting out on the aisle, and then the passenger pays only the seat fare, the same in amount that he would pay for a seat in the body of the car (R. 148–149).

On cross-examination the witness was asked: "Now, during the 32 years you said you worked over there they have never had any first-class accommodations for negroes available, have they?" (R. 159.) While the witness then answered in the negative, he obviously meant that negroes are not allowed to ride in the unsegregated part of a Pullman car, and immediately he corrected his answer, confirming his previous testimony that they can use the compartments in sleeping cars (R. 160).

It thus appears that there were first-class accommodations for negroes, that is, in the drawing

rooms or compartments of Pullman cars, at the regular seat fare, when they were available, and that they were equally as available to negroes as to white persons.

The Commission's finding that there is but little colored traffic is supported by the evidence.—The conductor testified that he found colored passengers occupying compartments and drawing rooms on his train once in a while (R. 138); as to how many colored passengers per year had applied to him for passage in a Pullman car on his train, he answered, "Well, it won't average one a year." (R. 140.) As to the proportion of colored to white passengers who customarily ride that train he stated: "Well, for the last year or so, we have had about—we have handled about 20 whites to one colored." He further stated that within his knowledge, one or two colored persons in the Pullman car per year would cover the amount of travel in those cars, and that the accommodations on that train devoted to colored people are adequate to care for the amount of travel of such people (R. 145); that in 32 years he had only 10 or 12 colored persons riding in Pullman cars, that one or two, about one per year, or something like that, had applied to him for accommodations (R. 137–138, 145, 168).

The examiner observed that the witness was "testifying only as to the passengers he sees in compartments or drawing rooms in Pullman cars; he is not testifying as to how many people offer themselves at ticket offices to buy tickets." (R. 139.) The wit-

ness did not know about the demand at ticket offices, but in the absence of evidence of a practice at ticket offices to refuse to sell to negroes space in Pullman compartments and drawing rooms when available, it seems reasonable to assume that negroes who applied for such space when available were sold it and that those who boarded the trains with such space were all who had seasonably applied for it at the ticket offices. As observed by the Commission in *Gaines* v. *Seaboard Air Line,* 16 I. C. C. 471, 475, the fact that colored people find it impossible to get Pullman reservations on a popular train within a few hours of the time of its departure "indicates absolutely nothing in the way of discrimination."

The absence of demand for Pullman accommodations by negroes is illustrated by the testimony of John J. Pullen, who, testifying in behalf of complainant (R. 115–121) stated that he is a retired physician, living in Chicago; that he had practiced in Arkansas, owns property in Hot Springs and Little Rock, and frequently makes trips down there; that he has had occasion to use the Rock Island in making trips from Chicago to Hot Springs, and that the coach accommodations for negroes are not as good as coach accommodations for whites. The last trip he made from Chicago to Hot Springs over the Rock Island was in September 1937, but he did not undertake to ride in the Pullman car. He bought his ticket intending to ride in a coach. Further, that he had never

ridden from Chicago to Hot Springs over that route in a Pullman car, and that he had never tried to do so (R. 120).

The evidence in the present case respecting the volume of colored passenger traffic is consistent with findings of the Commission in previous similar cases. For example, in *Gaines* v. *S. A. L., supra,* the Commission found: "The testimony is clear that colored travel is mainly for short distances, whether between intrastate or interstate points, and that the proportion of negro to white passengers on long journeys, such as make sleeping accommodations necessary is infinitesimal. . . . It is a matter of common observation that throughout the land, without regard to the section, to the local conditions, or to the local laws, the proportion of colored Pullman travel to white Pullman travel is infinitesimal in amount . . ." See also *Edwards* v. *N. C. & St. L. Ry. Co.,* 12 I. C. C. 247, 248; *Evans* v. *C. & O. Ry. Co.,* 92 I. C. C. 713; *Heard* v. *Georgia R. Co.,* 3 I. C. C. 111, 115.

The evidence shows that the compartments and drawing rooms in Pullman cars are ordinarily sufficient for the number of colored passengers who want to ride in Pullman cars.—The train conductor testified that, considering the number of colored persons who travel in Pullmans on his train, the drawing rooms and compartments are ordinarily adequate and sufficient to take care of all of those who desire Pullman accommodations; that there is "plenty of space for all we are handling." (R. 147.)

The witness affirmed that ordinarily he can accommodate the colored man who desires a drawing room or compartment; that ordinarily he can accommodate in a drawing room or a compartment the colored applicant for Pullman accommodations, and at the same time comply with the Arkansas law (R. 147–148).

There is no evidence that appellant was subjected to unjust discrimination in respect of dining-car service.—Although appellant testified at length (R. 70–96), he made no claim, and submitted no evidence, that he was subjected to discrimination in respect of dining-car service; he made no mention of the subject in his testimony. He did not divulge whether he was served with breakfast either in his compartment or in the dining car of the New Orleans train on which he rode from Chicago to Memphis. He did not testify that he desired to obtain either breakfast or luncheon on Rock Island train 45, or whether he preferred to wait for luncheon until after the train arrived at destination, at 1:05 p. m. He did not testify that the Rock Island refused to serve him either breakfast or luncheon.

The first mention made of the dining car was after appellant had left the stand. Then, appellant's counsel, in support of his objection to a certain question, made this statement (R. 145):

> "Well, but as first-class passengers, having paid the first-class fare, we contend that we can ride in the observation car, and in

the Pullman car, and in the dining car, and not up there in the Jim Crow car, which is only for coach passengers."

The appellant, when asked by the examiner: "You not only want a Pullman car, but you want another car, an observation car, put on there?" answered, speaking as counsel *pro se,* "I want dining-car accommodations also." (R. 157.)

While the conductor testified on cross-examination that colored passengers are not admitted into the dining car (R. 160), there was no testimony that negro passengers are denied the equivalent of dining-car service. If colored passengers are to be segregated, they may not be served at the same time with white passengers in the dining car. If, however, there is a demand for dining-car service by colored passengers—the record contains no evidence of such demand—it can easily be taken care of, as indicated by the Commission's report in *Gaines* v. *S. A. L., supra,* dealing with a complaint was brought by five colored men alleging *inter alia* that they were refused access to dining cars and thereby subjected to unjust discrimination. In holding that no unjust discrimination had been shown, the Commission found that the evidence was "clear that colored passengers do get the same service that is furnished the whites, the only discrimination made being in hours of service or the place of service. For instance, colored passengers are not served with meals in the dining car at the same time with white passengers, but in consideration of

the relative amount of long distance travel of the two races they are served on the third and last call. If the colored passenger does not desire to wait until the last call is made, he is, upon his request, served with the same food and with the same care at his seat either in the Pullman or in the ordinary coach, portable tables being used for this purpose."

In the absence of testimony upon the subject in the present case, it would seem reasonable to infer that the Rock Island would not refuse to sell meals to colored passengers, either in the dining car at a reasonable hour (segregated from white passengers) or at their seats either in the Pullman compartments or in the day coach. The mere showing that colored passengers are excluded from the dining car on the Rock Island in Arkansas, without a showing that they are denied the equivalent of dining-car service, does not establish unjust discrimination in violation of the Interstate Commerce Act.

III

Not all discriminations are unlawful under the Interstate Commerce Act but only those that are undue, unreasonable, or unjust. Whether a discrimination is undue, unreasonable, or unjust is a question of fact for the Commission

Sections 2 and 3 of the Interstate Commerce Act in broad terms prohibit "unjust discrimination" and "undue or unreasonable" prejudice. It is clear from their wording that these sections do not in absolute terms prohibit all discrimination or prej-

udice but only such discrimination as in "unjust" and prejudice that is "unreasonable" or "undue." Such has been the uniform holding of this Court. In *T. & P. Ry.* v. *I. C. C.*, 162 U. S. 197, it said that the principal purpose of the second section is to prevent *unjust* discrimination between shippers; "and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the Act, be regarded by the Commission." (P. 219.)

This statement, having relation to discrimination between shippers in rates for freight transportation, applies with equal force to alleged discrimination between passengers in the service performed or accommodations furnished under passenger fares.

The Court thereupon considered the third section, and after noting that it forbids any "undue or unreasonable" preference or advantage in favor of any person, etc., pointed out that "as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact." The Court said that "The mere circumstance that there is, in a given case, a preference

or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable." (Pp. 219–220.)

In *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, the Court said: "It is not any and every discrimination, preference, and prejudice that are denounced by the Commerce Act. Section 3 . . . renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. . . . And in the first paragraph of amended section 15 . . . it is rates, regulations, or practices that in the opinion of the Commission are '*unjustly* discriminatory, or *unduly* preferential or prejudicial,' etc., to which the prohibition is to be applied. (P. 481; Court's italics.)

In *Nashville Ry.* v. *Tennessee,* 262 U. S. 318, the Court said that every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory, because "such preference prevents absolute equality of treatment among all shippers or all travelers. But discrim-

ination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by sections 2 and 3) only that discrimination which is unreasonable, undue, or unjust. . . . Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case."

In *U. S.* v. *Trucking Co.*, 310 U. S. 344, the Court affirmed its prior holdings in this regard: "The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages, and discrimination."

The Court also affirmed prior holdings to the effect that particular problems of discrimination are to be considered and determined in the light of the national transportation problem and the policy of Congress to aid in the development of adequate national transportation. It said:

"The particular problem here involved is but a segment of the larger complicated national problem of rates with which the Commission must deal. As exemplified by this record, the Commission is 'in-

formed by experience' of years in its consideration of the relationship of forwarders to our national transportation system . . .

"The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. Its order was the embodiment of the Commission's judgment that the proposed tariff was a discrimination prohibited by the Act. 'The judgment so exercised, being supported by ample evidence, is conclusive.' "

In determining appellant's case the Commission properly gave consideration to the national transportation policy, which has for its purpose the maintenance of adequate transportation service. It was within its power, and therefore not in excess of its authority, to decline to issue an order, operating indefinitely and permanently in the future, the effect of which would be to require the carrier to provide facilities which appellant has not shown he will ever use, at an expense widely disproportionate to the demand for such facilities, and the revenue to be derived therefrom, in the face of the undisputed evidence that negro passengers purchasing first-class tickets are seated in the drawing rooms of Pullman cars, at the regular seat fare, and that ordinarily such facilities are ample to take care of the colored demand. Cf. *Wis. R. R. Com.* v. *C., B. & Q. R. R.*, 257 U. S. 563, 585; *New England Divisions Case*, 261 U. S. 184, 189–190; *U. S.* v.

Louisiana, 290 U. S. 70, 75; *Dayton-Goose Creek Ry.* v. *U. S.,* 263 U. S. 456; *Texas* v. *U. S.,* 292 U. S. 530, 531; *Tex. & P. Ry. Co.* v. *G. C. & S. F. Ry. Co.,* 270 U. S. 266; *Piedmont & Nor. Ry.* v. *U. S.,* 280 U. S. 469; 286 U. S. 299; *Atchison Ry.* v. *Railroad Comm.,* 283 U. S. 380; *Florida* v. *U. S.,* 292 U. S. 1, 6–7.

The Interstate Commerce Act neither requires nor prohibits segregation. At the opening of the present session of Congress Mr. Mitchell introduced a bill [5] providing:

> "That the Transportation Act (U. S. C., title 49, sec. 3 (1)), be, and the same is hereby, amended by adding a subsection to be known as subsection (a), which shall read as follows:
>
> '(a) It shall be unlawful to segregate any persons traveling as interstate passengers on any carriers subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employees, to the penalties hereinafter provided for violations of this Act.' "

[5] H. R. 112, 77 Cong., 1st Sess., introduced January 3, 1941, and referred to the Committee on Interstate and Foreign Commerce.

Similar bills were introduced by Mr. Mitchell at the last session of Congress and at the one before that;* but Congress has not adopted the proposed amendment, although meanwhile it has given extended consideration to the transportation problem, and on September 18, 1940, enacted Transportation Act, 1940.

Appellant of course could not hope to accomplish in these proceedings before the Commission what he might conceivably accomplish by legislation in Congress. The evidence submitted to the Commission was very narrow in its scope. It did not disclose general conditions; it related almost entirely to one train of one railroad. The Commission obviously could not lawfully issue an order having general application, upon the narrow record before it.

The general question whether segregation is to be abolished in all sections of the country where it is now practiced—the South and the Southwest—would seem to be one appropriately for determination by Congress.

IV

The Commission's order contravenes no constitutional provision

It is alleged that the Commission's order and findings deny to appellant due process of law and equal protection of the laws, in violation of the

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*H. R. 182, 76th Cong., 1st Sess., introduced January 3, 1939, and H. R. 8821, 75th Cong., 3d Sess.

Fourteenth Amendment. Since appellant was granted a full hearing by the Commission, which is admitted, there appears to be no basis for the allegation of denial of due process of law. Respecting the alleged denial of equal protection of the laws, it seems clear that the requirement of the Fourteenth Amendment that no State shall deny to any person the equal protection of the laws is not violated by a finding by the Commission, after full hearing, that an alleged discrimination is not violative of the Interstate Commerce Act. As previously shown, the Act does not require absolute equality but prohibits only discriminations which are unjust or undue. This provision is of general application. In *New York* v. *U. S.*, 257 U. S. 591, the Commission, finding that the passenger fares of 2 cents per mile applicable intrastate within the State of New York caused unjust discrimination against interstate commerce in their relation to interstate fares as increased by the Commission in 1920, in compliance with the requirements of Section 15a of the Interstate Commerce Act, added by Transportation Act, 1920, and to carry out the declared congressional purpose "to provide the people of the United States with adequate transportation," ordered the intrastate fares increased to the same basis as that applying interstate. It was alleged that the Commission's order was invalid because it enabled the New York Central to violate its contract with the State, and thereby impaired

the obligation of a contract in violation of Section 10, Article I, of the Federal Constitution. The State had a charter-contract with the railroad company by which the latter was bound not to charge more than 2 cents a mile for passenger carriage between Albany and Buffalo. This Court held: "That section provides that 'no *State* shall . . . pass any . . . law impairing the obligation of contracts,' and does not in terms restrict Congress or the United States." (P. 600–601; Court's italics.) Similarly the provisions of the Fourteenth Amendment do not in terms restrict Congress or the United States. Congress, in the exercise of its constitutional power to regulate interstate commerce, has not condemned all discrimination but has prohibited only that which is found by the Commission to be unjust or undue.

The constitutionality of the Arkansas statute is not here in issue, nor was that question in issue before the Commission, which as an administrative body is of course not authorized to determine the constitutionality of statutes.

V

Question of segregation is not here involved

The complaint to the Commission did not bring in issue the question of segregation. Its principal allegation was inequality of accommodations furnished. At the hearing before the Commission appellant, as counsel for himself, stated: "The ques-

tion of segregation is not involved. The law of the State of Arkansas, which has been put into the record here, provides that the passengers of the two races must be separated, but that the accommodations must be equal. Now, we are contending that a colored man is entitled to everything that a white man gets, who pays a similar fare, on these trains." (R. 156.)

In his exceptions to the examiner's proposed report, however, appellant expressed his opposition to segregation, as indicated by the following statement in the Commission's report: "At the hearing complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in that State for all passengers, both interstate and intrastate. However, in his exceptions he opposed it as abominable and urges that the statute does not require it as to interstate passengers." (R. 27–28.)

But before the court below appellant affirmed his prior statement before the Commission that segregation is not involved, stating to the court: ". . . There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding w h me, but if I buy first-class passage to ride on the Rock Island or on any other railroad in the United States, under my constitu-

tional rights I am entitled to the same treatment as any man is entitled to regardless of color." (R. 227–228.)

The ultimate question before the Commission was whether an order should be issued for the future. The Commission decided that under all the facts and circumstances no such order should be issued in this case.

The general principles applicable in cases of this kind had been stated in previous Commission decisions. In *Councill* v. *W. & A. R. R. Co.*, 1 I. C. C. 339 (1887), the Commission said (p. 345):

"It is both the right and the duty of railroad companies to make such reasonable regulations as will secure order and promote the comfort of their passengers. It is a custom of the railroad companies in the States where the defendant's road is located, and in all the States where the colored population is considerable, to provide separate cars for the exclusive use of colored and of white people."

After referring to a decision of the Supreme Court of Pennsylvania declaring the separation of white and colored passengers in a public conveyance to be a subject of "sound regulation to secure order, promote comfort, preserve peace, and maintain the rights of both carriers and passengers," the Commission further said (p. 346):

"Public sentiment, wherever the colored population is large, sanctions and requires this separa-

tion of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preference in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

Councill, in his complaint to the Commission, alleged that defendant had subjected him to unreasonable prejudice and disadvantage in violation of the Act to regulate commerce, in that, because of his color, he was not allowed a seat in the day coach set aside for women and for men accompanied by women, while white passengers who had purchased tickets at the same price paid by complainant were allowed to ride in said car. He further alleged that several persons on the train, one holding a lantern, "without provocation, struck the complainant with it several blows, cut and bruised his face, and the three together forcibly ejected him from the car and compelled him to go into and occupy another car." The defendant railroad denied that the persons who ejected the complainant from the white car were its agents.

"But the right of the carrier to assign a white man to another car than the ladies' car, or a colored man to a car for his own race, takes nothing from the right of either to have accommodations sub-

stantially equal to those of other passengers paying the same fare. The complainant had paid the same fare with other 'first-class' passengers. It was no more than fair dealing and common honesty that he should have the security and conveniences of travel for which his money had been accepted."

The Commission, finding that the accommodations furnished in the separate car for colored passengers were not equal to those furnished in the other car, ordered the railroad "to cease and desist from subjecting colored passengers to undue and unreasonable prejudice and disadvantage in violation of section 3 of the Act to regulate commerce, and from furnishing to colored persons purchasing first-class tickets on its road accommodations which are not equally safe and comfortable with those furnished other first-class passengers."

Heard v. *Ga. R. R. Co.*, 1 I. C. C. 428, 3 I. C. C. 111, and *Edwards* v. *N., C. & St. L. R. Co.*, 12 I. C. C. 247, are to the same effect and in these cases corrective orders were issued. In the *Edwards* case, at page 249, the Commission said: "If a railroad provides certain facilities and accommodations for first-class passengers of the white race, it is commanded by the law that like accommodations should be provided for colored passengers of the same class. The principle that must govern is that carriers must serve equally well all passengers, whether white or colored, paying the same fare. Failure to do this is discrimination and subjects

the passenger to 'undue and unreasonable prejudice and disadvantage.'"

In *Gaines* v. *S. A. L. Ry.*, 16 I. C. C. 471 (1909), the Commission, speaking of the segregation laws, said: "Throughout the section of the country embraced in this complaint the laws of the several states provide for the separation of the white and black passengers in the trains. These laws, in so far as they provide merely for such separation of the races, have been upheld by the courts as reasonable police regulations designed for the comfort, peace, and happiness of the black people as well as of the white, and, when equal accommodations are furnished the two races, are not open to just criticism from anyone. Nor are these laws and customs fairly open to comparison with the laws of states or countries where there is no race question because of the inconsiderable number of the black race."

Further, the Commission said: "A careful examination of the record before us indicates that notwithstanding the legally correct attitude of the defendants and their responsible officials, including city and district passenger agents, the colored traveler is not welcomed by the average ticket seller or the average Pullman conductor when he applies for sleeping-car accommodations. This condition is due to many things, the chief among which may be stated as (1) the exceeding infrequency of the demand; (2) the fear of breaking state laws in acceding thereto; (3) the natural, if legally inex-

cusable, confusion of the lay mind with respect to state and federal laws and the rights, obligations, and penalties attaching thereto; and frequently (4) the manner of the making of the demand."

Certain portions of the record before it, the Commission said, seemed to indicate "that a *modus vivendi* may be arrived at if the colored travelers and the carriers' servants will approach the situation each with respect and consideration for the prejudices and difficulties of the other. For instance, it is a matter of general knowledge and is stipulated in the record 'that the so-called race riot which occurred in Atlanta in the year 1906, began on or about September 22, 1906, and continued for about three days, more or less.' Yet in view of the fact and the state of feeling it indicated, one of the witnesses for the complainants, with reference to an experience he had coming from Richmond, Va., probably at Hamlet, N. C., on the night of October 6, 1906, or immediately after those riots and while the newspapers were full of accounts of violence in Atlanta, testified as follows:

> 'He (the conductor) was walking up and down in front of it (the sleeping car), and I accosted him. I said, "You are the conductor?" He said, "I am." I said, "I would like to have a berth to Atlanta." "Well," he said, "I don't know about that." I paced up and down the car with him there and finally I confronted him, and I said, "Let me ask you one question." I said,

"Do you mean to tell me that you refuse to sell me a berth on this car?" He said, "I do not, but I don't want to." I said, "It isn't a question of what you want to do." I said, "I want a berth; I want to know right now what you are going to do." He said, "If I sell you a berth there will be trouble down the road." I said, "All right, sir, I will take care of the trouble; I will take the berth." I got on the car, and there was no trouble. Now, the point is this, and the general complaint of the colored people, as a rule, is the unfairness, the attempt on the part of railroad agents, servants, as they say, to make it hard for them to get just such things as they could pay for.'

"The point of what the conductor said might very well have been that, in view of what had recently occurred in Atlanta and of the state of public feeling there, he did not care to assume the responsibility for placing the colored traveler to Atlanta in that car."

The record was quite clear on one point, the Commission said: "That in compliance with the laws of Georgia and the sentiment there negroes are assigned to the drawing-room, or separate compartments, so far as possible even in interstate travel." The Commission thought it might be useful to quote a part of the testimony of the general passenger agent of the Southern Railway:

"If a negro man, a proper kind of a man, a man who is clean and respectable, will go

to our ticket office in Atlanta, and want a sleeping-car berth, and there are berths available, accommodations available, our agent would attend to him just the same as he would a white man; but when you ask whether or not he can go and get one just the same as a white man any time, that has no bearing on the case, because white men are getting berths and making reservations every day, whereas the application of a colored man is very infrequent, so infrequent that we undertake as far as we can to sell them a berth in a stateroom or drawing room, as you may choose to call it, which is superior, equal to if not superior, to the accommodations furnished in the body of the car. It is always my understanding that that is very much more satisfactory to the colored man, to be separated from the white people in a separate compartment, than to be mixed up there in the body of the car. I don't believe I know of a colored man that wants to ride on a sleeping car that would not prefer that; it gives him all of the privileges of privacy, and relieves him of any embarrassment, and is likewise more satisfactory to the white people."

The ultimate conclusion of the Commission was that "Undue discrimination or prejudice has not been shown in any of the particulars alleged, and the complaint must be dismissed."

See also *Cozart* v. *Sou. Ry. Co.*, 16 I. C. C. 226, *Crosby* v. *St. L.-S. F. Ry. Co.*, 112 I. C. C. 239, and *Harden* v. *Pullman Company*, 120 I. C. C. 359.

VI

The question of the applicability of the Arkansas segregation statute to interstate passengers, and of its constitutionality if so applicable, is not necessarily presented for decision in this case

Although there are statements in the Commission's report which if isolated seem to indicate the Commission decided that the Arkansas statute is applicable to interstate passengers, a reading of the report as a whole indicates the Commission did not attempt to decide that question; and we suggest that the report should be so interpreted. "At the hearing," the Commission said, "complainant stated that segregation was not involved and apparently for the purpose of this case he accepted it, regarding the Arkansas statute as requiring it in the State for all passengers, both interstate and intrastate. However, in his exceptions he opposes it as abominable and urges that the statute does not require it as to interstate passengers. The statute is general in its terms in that like the Mississippi and Kentucky statutes dealt wth by the Supreme Court [in *Louisville, N. O. & T. R. Co.* v. *Miss.*, 133 U. S. 587, and *C. & O. Ry Co.* v. *Kentucky*, 179 U. S. 388], it does not mention either intrastate or interstate passengers. These latter statutes, as already stated, were by State courts confined to intrastate passengers and the Supreme Court accepted these constructions as binding on it. Complainant also relies on the Supreme Court's conclusions in *McCabe* v. *A. T. & S. F. R.*

Co., supra [235 U. S. 151], to the effect that the Oklahoma statute had to be construed as applying only intrastate because there had been no construction to the contrary by the State court." (R. 27–28.)

"Be that as it may," the Commission said, "the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic, and, while it is not for us to construe the statute, we think, in view of its general terms, that, until further informed by judicial determination, defendants are justified, as a matter of self-protection, in assuming that it applies to interstate, as well as intrastate, traffic." (R. 28.)

It appears, therefore, that other statements in the report having references to the statute, including: "the statute sets up two distinct groups of passengers . . ." (R. 25), and ". . . we must recognize that under the State law defendants must segregate . . ." (R. 29), should be read in the light of the above-quoted discussion and particularly the definite statement "it is not for us to construe the statute." The Commission clearly recognized that the question whether the statute should be construed as applying to interstate traffic is a judicial question, involving important constitutional considerations, to be determined in appropriate court proceedings, and not by the administrative body.

"What we are here dealing with," the Commission added, "is the practice of the carriers in assumed compliance with the statute, a practice which they could follow even if there were no statute." (R. 28.)

In support of the latter statement the report cited *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, in which, the Commission said, "dealing with coach passengers, the Supreme Court held that in a southern State a railroad has the right, by the establishment of appropriate rules and regulations, to require segregation, intrastate and interstate, aside from any statutory requirements, provided substantially the same accommodations are furnished for the two races. It said that railroad regulations respecting this matter were subject to the same tests of reasonableness as those enacted by legislative authority and that rules and regulations induced by the general sentiment of the community for which they are made and upon which they operate are not unreasonable." (R. 25.)

In that case Chiles, a colored man, bought a first-class ticket from Washington, D. C., to Lexington, Ky., over the C. & O. The train he took at Washington did not run through to Lexington and he changed to another train at Ashland, Ky., going into a car which, under the regulations of the carrier, was set apart exclusively for white persons. From this car he was required to remove to a car set apart exclusively for the transportation of col-

ored persons. He removed under protest and only after a police officer had been summoned by the carrier. Subsequently he brought action for damages in a State court, where the jury rendered a verdict against him. He appealed to the State Court of Appeals which affirmed the judgment, and the case was brought to this Court. In affirming the judgment, this Court considered the contention that Chiles was an interstate passenger and was entitled to a first-class passage, and that, therefore, the act of the carrier in causing him to be removed from the car at Ashland was a violation of his rights and subjected the carrier to damages. "The complaint of the action of the court," this Court said, "rests upon the contention that, as against an interstate passenger, the regulation of the company in providing different cars for the white and colored races is void. There is a statute of Kentucky which requires railroad companies to furnish separate coaches for white and colored passengers, but the Court of Appeals of the State put the statute out of consideration, declaring that it had no application to interstate trains, and defendant in error does not rest its defense upon that statute, but upon its rules and regulations."

This Court further said it "must keep in mind that we are not dealing with the law of a State attempting a regulation of interstate commerce beyond its power to make. We are dealing with the act of a private person, to wit, the railroad com-

pany and the distinction between state and interstate commerce we think is unimportant." It cited *Plessy* v. *Ferguson,* 163 U. S. 540, in which a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. "The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the Court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of the carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable."

The right of an interstate carrier to require segregation had been upheld in the much earlier decision in *Hall* v. *DeCuir,* 95 U. S. 485 (1877). In that case the Court passed on a Louisiana statute, which

required interstate carriers to give all passengers traveling within the State equal rights and privileges in all parts of the conveyance, without distinction on account of race or color.[7] The State Supreme Court had upheld an award of damages against the owner of a vessel who excluded colored passengers on account of their color from the cabin set apart for whites during the passage. This Court held that the statute was a regulation of interstate commerce and was void; that "Congressional inaction left Benson [the shipowner] at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat while pursuing her voyage within Louisiana or without as seem to him most for the interest of all concerned." Speaking of that case in *Chiles* v. *C. & O. Ry.*, 218 U. S. 71, 76, the Court said:

> "This language is pertinent to the case at bar, and demonstrates that the contention of the plaintiff in error is untenable. In other words, demonstrates that the interstate commerce clause of the Constitution does not constrain the action of carriers, but on the contrary leaves them to adopt rules and regulations for the government of their business, free from any interference except by Congress. Such rules and regulations, of course, must be reasonable, but whether they be such

[7] That statute was enacted in 1869. Later, Louisiana enacted a segregation statute, the constitutionality of which was sustained in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896).

cannot depend upon a passenger being state or interstate. This also is manifest from the cited case. There, as we have seen, an interstate colored passenger was excluded from the privileges of the cabin set apart for white persons by a regulation of the carrier and where the colored passenger's right to be was attempted to be provided by a state statute. The statute was declared invalid, because it attempted to force a carrier to do the very thing which plaintiff in error complains was not done in the case at bar, to wit, permit him to ride in the place set apart for white passengers. In other words, the statute was struck down, because it interfered with the regulations of the carrier as to interstate passengers. This court commented on the case subsequently in *Louisville &c. Railway Company* v. *Mississippi,* 133 U. S. 587, 590, and said: 'Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race was a question of interstate commerce, and to be determined by Congress alone.' We have seen that it was decided in *Hall* v. *DeCuir* that the inaction of Congress was equivalent to the declaration that a carrier could by regulations separate colored and white interstate passengers."

Decisions of the Commission also recognize the right of interstate carriers to require segregation, *Council* v. *W. & A. R. R. Co.,* 1 I. C. C. 339, *Gaines*

v. *S. A. L. Ry,* 16 I. C. C. 471, *Crosby* v. *St. L.-S. F. Ry. Co.,* 112 I. C. C. 239, *Harden* v. *Pullman Company,* 120 I. C. C. 359; and these cases affirm what is a matter of common knowledge that the carriers follow the practice of segregation only in territory where State segregation laws are in force. For example, in *Evans* v. *C. & O. R. Co.,* 92 I. C. C. 713, the Commission pointed out that the defendant's line traverses the District of Columbia and the States of Virginia, West Virginia, Kentucky, Ohio, Indiana and Illinois, but requires segregation only in Virginia and Kentucky. The train there involved ran from Charleston, W. Va., to Cincinnati, Ohio, and the practice of the carrier was as follows: "When the train on which complainant was a passenger arrived at the West Virginia-Kentucky line, the porter passed through the train requesting all white passengers in the compartment to move back to the coaches and all colored passengers in the coaches to move forward to the compartment, at the same time posting a sign with the word 'colored' in the compartment and signs with the word 'white' in the coaches."

Under these decisions it seems clear that the carriers have the right to follow the practice and that they have followed it for over 50 years. In the present case, the Commission dealt with the practice of the Rock Island in Arkansas, in assumed compliance with the Arkansas statute, a practice which it could continue to follow even though the

determination were made authoritatively in this case that the statute had no application to interstate passengers.

In these circumstances it would seem that the question as to the applicability of the State statute to interstate passengers, and of its constitutionality is so applicable, is not necessarily presented for decision in this case.

The following discussion is submitted, however, in the event the Court deems this question to be one for decision.

VII

Applicability of State segregation statute to interstate commerce

It appears that this question has never been directly decided by this Court. In 1877, in *Hall* v. *DeCuir*, 95 U. S. 485, the Court found that a Louisiana reconstruction statute passed in 1869 forbidding segregation was unconstitutional as an attempted regulation of interstate commerce as applied to a steamboat operating in interstate commerce on the Mississippi River from New Orleans to Vicksburg, Miss. Most of the subsequent cases which have held State statutes requiring segregation to be inapplicable to interstate commerce, have followed *Hall* v. *DeCuir*. These cases include *McCabe* v. *A. T. & S. F. Ry. Co.*, 186 Fed. 966, 972 (affirmed 235 U. S. 151), *Hart* v. *State*, 60 Atlantic 457, 462 (Court of Appeals of Maryland), *W. B. & A. El. R. Co.* v. *Waller*, 289 F. 598 (D. C. Court of Appeals).

In *Hall* v. *DeCuir*, it was found that while the statute purported only to control the carrier when engaged within the State, it necessarily involved his conduct to some extent in the management of his business throughout his entire voyage. "His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to

passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate."

While, no doubt, the statute, as applied within the State, was within the police power of the State, yet it must be conceded that that statute forbidding segregation is different from one requiring segregation. A statute forbidding segregation is not one tending to promote the peace, comfort and protection of the passengers as is one requiring segregation.

The Supreme Court of Tennessee, in *Smith* v. *State,* 46 S. W. 566, said "It is easy to perceive how it might conduce to the comfort, health, or safety of persons traveling to be separated; but no reason of this kind can be found, nor any other of a police nature, for requiring that all should be crowded or mixed together." Speaking of the Tennessee segregation statute, which the Court held was applicable to all passengers within the State, whether interstate or intrastate, the Court held that it was a proper and reasonable exercise of the State police power. "It is entitled, if that

were material, 'An act to promote the comfort of passengers.' It may operate for this purpose, or to promote the safety of one or both, or to further the ends of good order. If it be true, as is sometimes said, that race prejudices exist here that make it uncomfortable or unsafe, or promotive of disorder, to mix the races in public conveyances, then both safety and good order are promoted, as well as comfort in their separation. The state is to judge of the necessity for such a regulation. Whether either or both should be uncomfortable, unsafe, or liable to the injury or annoyance of disorder by such intermixture in travel is not the question. The question is whether it, in fact, is so, or whether the state legislature reasonably deemed it so, and provided against the consequences."

In *Ala. & Vicks. Ry. Co.* v. *Morris,* 60 Sou. 11, the Supreme Court of Mississippi held that the Legislature, in passing the Mississippi segregation law, did not intend to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. "To so hold would be to disregard the reason which underlies this legislation. The Legislature, in the exercise of its power to police the highways of commerce running through the state, enacted the statute in question to promote the peace, comfort, and general welfare of the public. The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by preju-

dice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth. . . .

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. . . .

"If we should hold that the statute is inapplicable to interstate travelers, it seems to us that necessarily it must be condemned altogether, as the theory upon which its wisdom and justice rests will thus be declared fanciful and without foundation in fact. If the peculiar conditions existing here demanded this legislation to conserve the peace of the state, and our lawmakers have so decided, the mere fact that the passenger is going out of the state, coming into the state from without, or traveling across the state, does not alter the complexion of affairs, nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race."

Since the decision in *Hall* v. *DeCuir* this Court has sustained the validity of many State statutes

enacted under the police power, which had the effect of regulating commerce within the State, both intrastate and interstate, in the absence of action by Congress. It would seem that the Arkansas segregation statute, if applied to all passengers within the State, would have no more effect upon interstate commerce than would many of the State statutes held valid by this Court.

That the Arkansas statute does not discriminate against interstate commerce is shown by the fact that in general terms it applies to "all railway companies carrying passengers in this State . . ." (R. 211.) That it does not put any appreciable burden upon interstate commerce under the facts of this case, is shown by the fact that the entire run of the train from Memphis to Hot Springs except for the first few minutes is in the State of Arkansas, that the carrier has voluntarily complied with the statute without contest, and that the clear indications are the carrier, in the interest of its own business, would require segregation on this train in the absence of the State statute. A carrier is dependent for its patronage upon the people in the communities it serves and if the sentiment is in favor of segregation the carrier is virtually compelled to enforce it; and obviously the carrier must provide for the comfort, peace, and safety of all its passengers both black and white.

Smith v. *State, supra,* was an indictment of a conductor of a Louisville & Nashville Railroad passenger train under the Tennessee segregation stat-

ute for unlawfully failing to assign certain negroes to the car used in his train for colored passengers and for permitting them to ride in the car assigned to white passengers. Convicted in the trial court, he appealed to the Supreme Court of Tennessee and contended that the act referred to was invalid as a regulation of interstate commerce. Distinguishing *Hall* v. *DeCuir,* 95 U. S. 485, the Court held that the Tennessee statute was a reasonable exercise of the police power, since it tended to promote the comfort of the people, and that, as applied both to intrastate and interstate travel was not an invalid regulation of interstate commerce. Congress had not acted upon the subject and, therefore, the State could enact such a statute in the exercise of its police power and apply it to all passengers within the State.

In *A. & V. Ry. Co.* v. *Morris, supra,* appellee procured a ticket which entitled her to passage on appellant's railway from Vicksburg to Meridian (both points within Mississippi), and from the latter place, over the line of connecting carriers, to the city of New York. In addition to the railway ticket, appellee purchased from the agent of appellant a sleeping-car ticket entitling her to a berth in the Pullman car attached to and forming a part of the train. When appellee boarded the train at Vicksburg, she discovered as her fellow passengers three men of the negro race, and protested to the employees of appellant on the train that either she or the negroes be assigned to an-

other coach. This demand was refused or ignored, and the appellee was forced, if she occupied a sleeper at all, to retire to her berth in the same car with the berths occupied by the negro passengers. She claimed to have suffered much distress of mind and body, the result of being forced to occupy the same sleeping apartments used by men of a different race, and recovered a judgment.

The Court stated that the question involved was whether a State segregation statute is an invasion of the national authority to regulate and control commerce between the States, should it be interpreted to mean that the statute applies to interstate travelers abroad trains forming a part of a chain of carriers engaged in the business of transporting passengers taken up within the State for carriage to a point without the State. The Court held that the legislature did not intend to limit the application of the statute to that portion of the train given over to the accommodation of intrastate passengers. Finding the verdict of the jury ($15,000) to be grossly excessive, the Court ruled that if appellee would remit all except $2,000 the case would be affirmed.

In *Sou. Ry. Co.* v. *Norton*, 73 Sou. 1 (Sup. Ct., Miss.), a judgment was obtained by the appellee, Mary Norton, for $1,000 against the railway company because of violation of the Mississippi segregation statute, under the following facts: "The appellee . . ., boarded . . . the 'Memphis Special'

train at Philadelphia, Pa., and traveled from that point to Memphis, Tenn., in a Pullman sleeping car. In the same Pullman car there was a negro passenger, who had boarded the train in New York and whose destination was Memphis, Tenn. The Court pointed out that a segregation statute is in force in every state through which the Southern Railway passes except Illinois and Indiana. It affirmed its prior holding "that the statute is a reasonable constitutional exercise of the police power of the state, and is valid, and applies to both intrastate and interstate passengers; that the statute was enacted to promote the peace, comfort, and general welfare of the public."

Sou. Ry. Co. v. *Primrose,* 73 Sou. 2, affirmed a judgment recovered by appellee, Carrie Primrose, for $1,000 under circumstances similar to those in the *Norton* case, *supra.*

The Commission evidently had in mind cases like these when it expressed the view that defendants are justified, as a matter of self-protection, in assuming that the Arkansas statute applies to interstate as well as intrastate traffic, until further informed by judicial determination.

Both *Smith* v. *State, supra,* and *A. & V. Ry. Co.* v. *Morris, supra,* were appealed to this Court by the carriers. Both appeals were dismissed on the motion of the carriers (21 Sup. Ct. 917, 45 L. Ed. 1256 (not in U. S. Reports); 234 U. S. 766). Why the carriers withdrew the cases after they were ap-

pealed to this Court does not appear. It is inferable, however, that they became satisfied with the decisions of the State Supreme Courts that the State segregation statutes applied to interstate commerce. At least, they decided not to contest those decisions.

CONCLUSION

The decree of the court below should be affirmed.

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